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No. 90-747

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 13, 1990
CERTIORARI GRANTED MARCH 4, 1991

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JOINT APPENDIX

TABLE OF CONTENTS *

		Page
1.	District Court Docket Entries	1
2.	Court of Appeals Docket Entries	11
3.	Second Amended Complaint	14
	Selected Exhibits:	
	A. Miami News Editorial	28
	D. 3/30/87 letter from INS	31
	J. Miami Herald Article	32
	N. 7/15/85 Letter from INS (Waldroup)	38
4.	Declaration of John Eaves (Attachments 1-6 Omitted in Printing and Lodged with the Court)	40
5.	Excerpts from the Transcript of Proceedings, March 1, 1989	49

* The opinion of the court of appeals and orders of the district court are printed in the appendix to the petition and have not been reproduced here.

TABLE OF CONTENTS—Continued

		Page
6.	Declaration of Richard H. Melton	53
7.	Declaration of Pratt Byrd	59
8.	Excerpts from the Transcript of Proceedings, April 12, 1989	65
9.	State Department documents released without redactions (selected pages)	67
10.	Order Granting Certiorari	75

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil No. 86-2430-CIV-HASTINGS

RAY, MICHAEL D., ETC., ET AL.

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1986		
Nov 26	1	COMPLAINT.
26	2	MOTION & ORDER (by Clk-11/26/86) APPTMT of Process Serv, Neil D. Kolner (EOD- 12/3/86).
26	3	SUMMONS Issd as to deft, U.S. Dept of Justice, by Pltf.
26	4	SUMMONS Issd as to deft, INS, by Pltf.
Dec 03	5	ORDER (ALH-12/1/86) Prel P/T Order (EOD 12/5/86-CCAP)
19	6	RETURN of summons exec as to deft United States Dept. of State, on 12/9/86
19	7	RETURN of summons exec as to deft U.S. Dept. of Justice on 12/9/86
24	8	SUMMONS issd as to Exec Office for Immigration Review.
24	9	FIRST Amended complt for declaratory & inj relief by pltfs.

DATE	NR.	PROCEEDINGS
1987		
Jan 9	10	MOTION to dismiss & memo of law by deft
22	12	MOTION for sanctions & memo in opp to defts' M/dism & memo, by pltf.
Feb. 4	13	REPLY memo in supt of defts' m/dism by defts, INS.
12	14	MOTION to stay disc./alt. for protective order & Memo., by Deft. INS.
13	15	MEMO in opp to defts. improper motion to stay disc. or for a protective order by pltfs.
17	16	RE-NOTICE of tkg. depo. of Marc Fisher. by pltfs.
19	17	NOTICE of tkg dpe of Marc Fisher on 2/25/87 by pltfs.
25	18	ORDER (ALH 2/24/87) Denying defts m/ to stay disc or M/ for Protective Order Regarding dep ot Marc Fisher on 2/27/87. Dep shall proceed as sched.
Mar. 9	19	NOTICE of supp auth by pltfs.
24	20	MOTION to certify suit a maintainable as a class action by pltfs. (EOD 3/24/87).
24	21	MEMO in supt of m/ to certify as maintainable as a class action by pltf. (EOD 3/27/87).
Apr. 3	22	MEMO In opp to pltfs' m/ for class cert by deft.
13	23	REPLY memo to INS' misrepresentation of law by pltf.
20	24	MOTION for s/j & memo by defts.
20	25	TRANSCRIPT of dep of Marc Fisher.

DATE	NR.	PROCEEDINGS
1987		
27	26	ORDER (ALH 4/24/87) GRanting m/ dism First AMended complt. Pltfs have 30 days to file Second amended complt. (EOD 5/5/87 CCAP).
30	27	RE-NOTICE of tkg. depo. of Alan C. Nelson, Commissioner of INS, on Thursday, May 12, 1987 at 2:00 p.m.
30	28	MEMORANDUM of law in opp. to deft's INS and Eori Sham M/M/S/J, by pltfs.
May 7	29	MOTION to quash subpoena & memo by Commissioner of INS.
11	30	VERFIED [sic] SUMMARY of testimony sought fgrom INS commissioner A. Nelson., by pltf.
13	31	MOTION & memo for ext of time to file amended complt, by Pltfs.
18	32	MEMO in opp to motn to quash subpoena of Alan Nelson, by Pltfs.
18	33	ORDER (ALH 5/18/87) GRANTING Pltfs' motn for ext to file amended complaint to 6/3/87. (EOD 5/21/87-CCAP).
19	34	RESPONSE to motn for ext of time to file amended complt, by defts.
20	35	REPLY Memo in supp of mont to quash subpoena of Alan Nelson, by defts.
June 3	36	SECOND amended compt for decaratory, injunctive & other relief; by pltfs
26	37	MOTION for enlgm't of time to resp to second amended complt by Defts.
Jul 2	38	ANSWER to complt by Defts.

DATE	NR.	PROCEEDINGS
1987		
2	39	ORDER (ALH 7/2/87) M/enlg time to resp to second amended complt GRANTED up to 7/3/87 (EOD 7/8/87CCAP).
27	40	REPLY to deft affirm defenses, by pltfs
Sept 24	41	MOTION to quash subpoenas & memo, by defts.
24	42	MOTION for S/J & memo, by defts.
25	43	ORDER (ALH 9/22/87) P/T order & notice of trial 2wk cal 2/22/88 cal call on 2/18/88. (EOD 9/30/87-ccap).
29	44	MOTION req. Deft State Dept release unedited doc and memo, by Pltfs.
Oct 5	45	NOTICE of filing Deft State Department's Edited Documents, by Pltf.
6	46	MEMO in opp to Pltfs mot for Order req Deft State Dept to release unedited Docs. by U.S. Immigration and Naturalization.
7	47	MEMO in opp to Defts mot for S/J. by Pltfs'.
7	48	MEMO in opp to Fefts [sic] mot to Stay Disc by Pltf.
7	49	MEMO in opp to Deft U.S. immagration service employees mot to quash subp & memo of law. by Pltfs'.
14	50	REPLY to all Defts memo in opp to Pltf mot for order req. State Dept to rel unedited docs. by Pltfs.
29	51	NOTICE of pendency of mot to certify class.
Nov 3	52	SUPPLEMENTAL mot for s/j & memo by defts INS, EOIR & U.S. Dept. of State.
13	53	NOTICE of depo of John Eaves on 11/30/87 by Pltf.

DATE	NR.	PROCEEDINGS
1987		
13	54	NOTICE of depo of Alan Nelson on 11/30/87 by Pltf.
16	55	MEMO in opp to Defts unauthorized suppl mot grounded on inapplicable law by Pltf.
18	56	MMOTION [sic] for a protect ordr, by Deft.
19	57	MOTION for order to compel sidcov, by Pltfs.
Dec 1	58	RESPONSE to mot for order to compel discovery by Defts.
1	59	MOTION to strike by Defts.
07	60	MEMO In Opp to M/Strike, by Pltfs.
07	61	REPLY Memo in Supp of M/Order to Compel Disc, by Pltfs.
15	62	MEMO in opp to Defts' mot for Protect Order by Pltf.
1988		
Jan 7	63	MOTION for an ext time which to complete disc & p/t order requirements & con of tr w/aff & memo by pltfs.
15	64	ORDER (ALH 1/13/88) Resetting trial for period of 6/13 to 6/24/88.
20	65	NOTICE of pendency of m/ to compel disc by pltfs.
20	66	NOTICE of pendency of m/ for an order req deft State Dept to release unedited document by pltfs.
20	67	MOTION for order to compel disc by pltfs.
Feb 12	68	VERIFIED mot for continuance of cal call & trial by Pltf.
May 16	69	NOTICE of pendency of verified motn for continuance Calendar Call & Trial by Pltfs.

DATE	NR.	PROCEEDINGS
1988		
16	70	EMERGENCY suppl motn for continuance of tial & Cal Call by Pltf.
18	71	NOTICE of pendency of prior notices of pendency of 1. Motion for an order requiring Deft to release unedited documents 2. motn to compel discovery & 3. motn to certify class. by Pltf.
25	72	UNILATERAL proposed P/T stip by Pltfs.
Aug 12	73	MOTION to strike answer & for judgment & memo, w/exhs, by pltfs.
18	74	RESPONSE to Pltf's motn to strike & for Judgment, by defts.
25	75	VERIFIED reply memo in sup of motn to strike ans & for judgment, by Pltfs.
Nov 29	76	NOTICE of pendency of motn to strike & for judgm,ent, by pltfs.
1989		
Feb 22	77	NOTICE of hrg. on all pend. motions on Wed. March 1, 1989 at 10:00 am, by clk.
27	78	MOTION for cont. on hrg. on all pend. motions, by deft.
Mar 3	79	ORDER (DWD 3/2/89) GRANTING s/j in favor of INS & EOIR, w/respect to the FOIA info requests explained or shown to be non-existent. The State Dept is required w/in 15 days of order to supply the redacted info contained in the seventeen documents; F/J as to State Dept is w/held until time period has expired & a——— has been made to the court that the names have been furnished to the pltfs, & if they have not, the court will take further appropriate action. (EOD 3/20/89-CCAP)

DATE	NR.	PROCEEDINGS
1989		
3	80	FINAL JDMT (DWD 3-2-89) GRANTING S/J in favor of INS & this action is DISMISSED on merits; GRANTING S/J in favor of EOIC Review & this action is also DISMISSED on merits. (EOD 3/20/89-CCAP)
13	81	MOTION to alter or amend jdmt, by pltfs'.
13	82	REQUEST for hrg on pltfs' Rule 59(e) mot to alter or amend jdmt, by pltfs.
13	83	MEMO in supp of pltfs' mot to alter to amend jdmt, by pltfs.
16	84	MOTION for enlrg of time to resp to court's order of 3/1/89, by deft US Atty.
17	85	MEMO in opp to defts' mot for enlrg of time to resp to court's order, by pltfs.
17	86	MOTION to alter or amend jdmt & memo, by defts.
30	87	NOTICE of filing of original aff. of Richard Melton, by Dexter A. LEE, AUSA
30	88	DECLARATION of Richard Melton.
30	89	MOTION for ext. of time to resp. to pltfs. m/ alter or amend judgment, by defts.
30	90	MEMORANDUM in opp. to defts m/alter or amend judgment, by pltfs.
31	91	MEMO in opp to m/elg time to resp to m/ alter judgmt, by Pltfs.
Apr 4	92	MEMO in opp to pltfs' mot to alter or amend jdmt, by defts.
4	93	SUPPLEMENTAL memo in supp of their mot to alter or amend jdmt, by defts.
6	94	NOTICE Of filing of orig aff of Pratt Byrd.

DATE	NR.	PROCEEDINGS
1989		
6	95	DECLARATION of Pratt Byrd.
Apr. 6	96	ORDER (DWD-FOR-ALH-4/6/89) DENYING pltfs. m/alter or amend judgment. This cause is set for oral argument on the remaning motions on Wed. Apr. 12, 1989 at 10:00 am. (EOD-4/12/89-CCAP)
12	97	MINUTES or oral argument on 4/12/89.
12	98	MOTION for *Pro Hac Vice* app & memo, by Pltf.
19	99	ORDER (DWD-4/13/89) 1. GRANTING Pltf's m/appear pro hac vice. 2. DENYING Deft's m/alter or amend. 3. COMPELLING State Dept to release unredacted docs w/in ten days of 4/12/89 o/a. (EOD 4/20/89-CCAP).
21	100	NOTICE OF APPEAL by deft U.S. Department of State from Oral Order rendered on 4/12/89 denying deft's mot to alter or amend jdmt & Order of 3/3/89 directing deft to disclose names of Hiatian returnees redacted from documents previously provided to pltfs (Copies to USCA & Attys of Record) (No fee required).
21	101	MOTION for stay pend. appeal, by deft.
21	102	MEMORANDUM in supp. of m/stay pend. appeal, by deft.
24	103	CORRECTED NOTICE OF APPEAL by deft U.S. Department of State from written Order rendered on 4/13/89 denying deft's mot to alter or amend jdmt & Order of 3/3/89 directing deft to disclose names of Haitian returnees redacted from documents previously provided to pltfs. (Copy to USCA). (No fee required).

DATE	NR.	PROCEEDINGS
1989		
May 2	104	ORDER (USCA 4/26/89) GRANTING Appellant's M/stay pending appeal. (USCA #89-5375)
16	105	SWORN MOTION for costs & attys. fees, by pltfs.
16	106	MEMORANDUM in supp. of m/attys. fees & costs, by pltfs.
June 2	107	MOTION for stay pending appeal, by deft USA.
2	108	MEMO in supp of M/stay pltfs' M/attys fees & costs, by deft USA.
2	109	MOTION for order granting costs & attys fees by default, by pltfs.
2	110	MOTION to require defts to order addl transc for ROA & memo in supp, by pltfs.
2	111	MEMO in supp of pltfs M/prder [sic] granting costs & attys fees by default, by pltfs.
16	112	NOTICE OF APPEAL by pltfs from F/J entered on 3/3/89, Order entered on 3/3/89 & Order denying pltf's mot to alter or amend jdmt entered on 4/6/89. (Copies to USCA & Attys of Record) (Fee paid—Receipt #63291—$105.00).
*14	113	RESPONSE to pltf's M/addl transc for ROA, by defts.
July 5	—	USCA ack rcpt of NOA, USCA case # 89-5375.
11	114	NOTICE (clk-7/7/89) to csl, purs Administrative order 89-34, date 7/6/89, case RE-ASSIGNED to cal of Hon James C. Paine.

DATE	NR.	PROCEEDINGS
1989		
26	115	ORDER (JCP7/25/89) DENYING, as moot, ptlfs mot to require defts to prd add'l transcripts. (EOD7/28/89)
9/24/87	116	MOTION to Stay Discov & Memo, by defts.
30	117	MEMO in opp to defts mot for Stay pend'g appeal, by ptlfs.
Sept 18	118	REPLY to pltfs opp to mot to Stay mot for atty fees & costs, by deft.
7	119	TRANSCRIPT of hrg on mot for S/J hld 3/1/89 before Jdg Dyer, pgs 1-44.
Oct 2	120	ORDER (JCP10/2/89) GRANTING defts mot to stay of mot for atty fees & costs til USCA issues opinion. (EOD10/3/89)
9/28/89	121	TRANSCRIPT of hrg before Hon David Dyer on 4/12/89.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5375

RAY, MICHAEL D., ETC., ET AL.

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/26/89	Stay Pending Appeal Granted
4/28/89	Flg. appellee's motion to vacate order of 4/26/89
5/8/89	Flg. appellants opposition to motion to vacate.
5/18/89	Flg. Order DENYING motion to vacate stay. GBT-RS-PAK
8/9/89	Flg. ltr, request for clarification of briefing schedule.
8/11/89	Flg. response of aple to clarification of briefing schedule.
8/16/89	Flg. Order: Initial Brief shall be filed by plaintiffs-appellees-cross-appellant. JLE ih
4-16-90	Flg. Government's Suggestion of Mootness of Plaintiffs' Non-Foia Claims. (CE'd) fd (Not a Motion)
5-7-90	Flg. Appellees' reply to Government's Suggestion of Mootness of Plaintiffs' Non-Foia Claims. (CE'd) fd

DATE	PROCEEDINGS
5-24-90	Flg. Appellant's Request to Take Judicial Notice (documentary items) (CE'd) fd
6/28/90	Flg. Order: Motion to take judicial notice is DENIED. PTF
8/27/90	Flg. appt. motion for stay of disclosure pending rehearing or alter. motion for stay pending certiorari.
8/28/90	Flg. response of apple. to motion to stay.
8/29/90	Flg. aple motion for extension of time to file petition for atty.
8/30/90	Flg. order: Appellees' motion for an extension of time in which to file motion for attorney's fees to and including Sept. 15, 1990, is GRANTED. (PTF).
8/31/90	Flg. Order: Appt. motion for stay of release is GRANTED. Government shall file immediately w/Clerk of court all the redacted information by NOON on TUESDAY Sept. 4, 1990. If information not received, the motion for stay is denied. If timely filed, the government has until September 14, 1990 to file whatever petitions it deems advisable.
9-14-90	Flg. Appellees' Motion for Attorney's Fees and Costs.
9-14-90	Flg. Appellants' Motion for Clarification and modification of August 30, 1990 order.
9/20/90	Flg. appt. motion to stay proceedings on attorneys' fees and for 30-day extension to respond to motion.
10/3/90	Flg. Order: Appt. motion to stay proceedings on attorneys' fees is GRANTED pending disposition of rehearing; 30-day extension to respond to attorneys' fees is DENIED; response is due 14 days after ruling on the rehearing; Aple's request for interim award of fees is DENIED.

DATE	PROCEEDINGS
10/2/90	Flg. response of Pay to attorneys' fees stay/extension.
10/9/90	Flg. Order: Motion for clarification/modification of 8/31/90 order is DENIED; Clerk is instructed to hold information under seal until ordered by the court to do otherwise. PTF-FMJ-GIBSON
10/24/90	Flg. Order: Stay of Mandate granted to and including 11/12/90. If neither a petition nor a further stay has been entered by this court or the Supreme Court, the Clerk is authorized to deliver redacted information to plaintiffs at noon 11/12/90. If a petition is filed by noon on 11/12/90, the stay will continue in effect until the disposition by the Supreme Court. If cert is denied, upon the filing of same with the court, the Clerk shall issue mandate and deliver redacted information to Plaintiffs.
10/29/90	Flg. appt. response to motion for attorneys fees.
11/8/90	Flg. aple's motion to file response to appt. reply on atty. fees.
11/16/90	Flg. appt. opposition to appt. 11/8/90 motion.
11/20/90	Flg. Order GRANTING aple's motion to file reply to appt. response.
11/20/90	Flg. aple. reply to appt. response on attorneys fees.
12/19/90	Flg. Order: Motion for atty's fees is HELD IN ABEYANCE pending disposition of petition for certiorari in the Supreme Court PTF-FMJ-GIBSON
3/4/91	Per Bruce Forrest (aplt's counsel), cert. has been granted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 86-2430-Civ-HASTINGS

MICHAEL D. RAY, ESQUIRE, individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

THE UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION and NATURALIZATION SERVICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE, and the UNITED STATES DEPARTMENT OF STATE, DEFENDANTS

SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

1. This is an action under the Freedom of Information Act (hereafter, "FOIA"), 5 U.S.C. section 552 as amended, and the Administrative Procedure Act, Title 5 U.S.C. sections 704 and 706, to order the production of agency records improperly withheld from plaintiffs, and for declaratory and injunctive relief.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. section 552 (a)(4)(B) and 5 U.S.C. sections 704 and 706, 28 U.S.C. sections 1331, 1361, 2201 and 2202, and pursuant to this Court's inherent equity jurisdiction. Plaintiffs request this Court (i) to declare unlawful defendants' dissemination of "disinformation" to the public and to the press in regard to the alleged physical safety of Haitian returnees to Haiti, (ii) to enjoin the final exclusion/

deportation hearings of the within class described below, and (iii) to stay the final orders of exclusion and deportation for the class members until at least six (6) months after the requested information is provided.

3. Plaintiff MICHAEL D. RAY, Esquire, is an individual citizen and an attorney for numerous (black) Haitian nationals who have applied for political asylum in the United States and who either (i) have applications pending before the Immigration Judges of the Department of Justice's EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, or (ii) have already been ordered excluded and/or deported by said agency.

4. Plaintiffs IVES AUDATE, JEAN HEVIL LOISEAU and YVON NICOLAS (hereinafter "Audate", "Loiseau" and "Nicolas", respectively, or "asylum applicants", collectively) are Haitian citizens who have applied for and are entitled to political asylum in the United States. Their cases are now pending befor immigration judges.

5. Defendant UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE (hereinafter "INS") is an agency of the United States, and has or should have possession of records establishing whether plaintiffs have legitimate fear of persecution if returned to Haiti. Defendant has, in fact, informed the press on more than one occasion that it does possess such records, and it is these records of defendants to which plaintiffs seek access.

6. Defendant EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE (hereinafter "EOIR" or "Immigration Judges") is a division of the DEPARTMENT OF JUSTICE staffed with immigration judges who

hear deportation and exclusion cases and claims for black Haitian political asylum applicants filed pursuant thereto.

7. Defendant UNITED STATES DEPARTMENT OF STATE, is an agency of the United States and upon information and belief has possession of the records to which plaintiffs seek access.

CLASS ACTION ALLEGATIONS

8. This is a class action by plaintiffs seeking political asylum, filed pursuant to Fed.R.Civ.P.23(b)(2) on behalf of themselves and all others similarly situated.

9. The class of persons represented by the plaintiffs consists of all black Haitian citizens presently under exclusion or deportation proceedings, or under final orders of exclusion and deportation, or who will be under such proceedings or orders in time to join this class, and who have or who will present a claim for political asylum before the immigration judges.

10. The members of plaintiffs' class are so numerous that joinder of all members is impracticable. The exact size of plaintiff's class is not known, but the size of the class and the identification of its members is subject to determination through information within the control of defendants.

11. The questions of law and fact which are common to the plaintiffs' class include:

    1. whether any Haitian political asylum petitioner can receive a due process fair hearing on his/her claim without being provided factual information which is or should be possessed by the government concerning the fate of returnees/deportees to Haiti;

    2. whether defendants withhold material evidence relevant to plaintiffs' claims for political asylum, thereby prejudicing the asylum applicant in his/her opportunity to be heard and to present their claims;

    3. whether defendants, by withholding information requested pursuant to FOIA that may support plaintiffs' claims, effectively obstruct plaintiffs' rights to rebut the form letter STATE DEPARTMENT recommendations, almost universally against political asylum issued in response to each plaintiff's request for political asylum;

    4. whether defendants engage in illegal conduct by attempting to brainwash the public and immigration judges with false propaganda about the lack of persecution of those Haitians returned to Haiti by defendants in order to obstruct the laws respecting the grant of political asylum;

    5. whether defendants attempt through their false propaganda, thought control, and brainwashing of the public to crush dissent against their practices complained of herein;

    6. whether the conduct of defendants is racially motivated and directed against plaintiffs on account of their color which is black.

12. The claims of plaintiff are typical of the claims of the class, and the representative plaintiffs will fairly and adequately protect the interests of the class.

13. Defendants have acted on grounds generally applicable to all class members, and have refused to remedy their own non-compliance with FOIA requests, thereby making appropriate final injunctive relief and declaratory relief with respect to the class as a whole.

GENERAL ALLEGATIONS

14. The asylum applicants have been placed in proceedings before the EOIR, which conducts hearings in deportation proceedings and exclusion proceedings on applications for political asylum.

15. Pursuant to Federal law in every asylum case the STATE DEPARTMENT issues a recommendation letter for or against the granting of political asylum.

16. Audate has received a favorable recommendation from the STATE DEPARTMENT, while Loiseau and Nicolas, like almost every Haitian national seeking asylum in the United States, have received adverse recommendations.

17. Controlling and relevant Federal law also allows an alien requesting political asylum before the Immigration judge to have a reasonable opportunity to examine evidence against him, to present evidence in his or her own behalf and to rebut the STATE DEPARTMENT recommendation made in reference to his or her asylum claim.

18. The asylum applicants are entitled to political asylum in the United States pursuant to controlling law if they can establish in the courts of the defendants herein that they have a well-founded fear of persecution if returned to Haiti.

COUNT I. FOIA VIOLATIONS FOR FAILURE TO PRODUCE NAMES OF HAITIAN RETURNEES

19. The Director of the U.S. IMMIGRATION AND NATURALIZATION SERVICE (hereafter, "INS"), in Miami, Perry Rivkind, offered "to provide the names of 600 Haitians who have been sent back" to Haiti without so much as a "slap on the wrist", and alleged that nothing bad, no physical harm, had happened to them or to any other Haitian deportees,

according to a column written by Editor Howard Kleinberg in *The Miami News* on March 12, 1985.

20. Six days later, March 18, 1985, plaintiff/attorney MICHAEL D. RAY filed a FOIA request with INS requesting the reported list of 600 Haitian returnees promised by INS Director Rivkind to anyone who wanted it (copy of FOIA request and *The Miami News* article attached hereto as Exhibit A).

21. Seventy four (74) days later, May 31, 1985, INS answered plaintiffs' FOIA request—required in ten (10) days by law—by refusing to provide the list of 600 names, alleging instead, that "Mr. Rivkind has stated he was misquoted by *The Miami News*" (copy of INS' 5-31-85 FOIA response attached hereto as Exhibit B).

22. Upon information and belief, District Director Rivkind was not misquoted by the editor of *The Miami News*, and INS does, in fact, have said touted report on 600 Haitian returnees but refuses to produce the names as required by law, deliberately choosing instead to improperly influence public opinion by disseminating "disinformation" propaganda regarding the fate of Haitian returnees.

23. On February 17, 1987 defendant INS received a FOIA request filed by Audate requesting the reported list of 600 Haitian returnees promised by INS Director Rivkind. (copy attached hereto as Exhibit C).

24. On March 30, 1987 defendant INS answered AUDATE'S FOIA request without producing any names and by claiming again that District Director Rivkind "was misquoted by *The Miami News*." (copy of letter dated March 30, 1987 attached hereto as Exhibit D).

25. Upon information and belief Director Rivkind was not misquoted, and he does possess said names of returnees to Haiti.

26. On May 7, 1987 defendant INS received FOIA requests filed by Nicolas and Loiseau requesting the reported list of 600 Haitian returnees promised by INS Director Rivkind and copies of investigative reports to Haiti. (Copy attached hereto as Exhibit E). An acknowledgment of receipt of these requests stating that they were being processed has been received (copies attached hereto as Exhibits F and G), but no agency records requested have been received.

27. A Written FOIA Request for the 600 names was also forwarded by Plaintiff RAY to the STATE DEPARTMENT on June 12, 1985 upon the oral suggestion of Miami INS Assistant District Director of Management, George Waldroup, and was received by the STATE DEPARTMENT on June 15, 1985 (copy of certified return postal receipt attached hereto as H).

28. By law, the STATE DEPARTMENT was required to provide plaintiff with an answer to the June 12, 1985 FOIA request within ten (10) working days. Plaintiff Ray finally received an "answer" to his FOIA request almost two years later written by the STATE DEPARTMENT on March 10, 1987. (copy of STATE DEPARTMENT response attached hereto as Exhibit I).

29. In this March 10, 1987 "answer" the STATE DEPARTMENT concluded that they found no requested records and directed RAY to direct his request back to INS, where he had started two years previously.

30. Defendant STATE DEPARTMENT knew or should have known that this "answer" to the FOIA request concerning the names and addresses of Haitian re-

turnees is erroneous since, in its own Country Reports on Human Rights Practices for 1985 the STATE DEPARTMENT makes specific mention of its investigations and interviews of returnees.

31. Plaintiffs are entitled to access to the 600 names and reports thereon regarding the fate of Haitian returnees possessed by the STATE DEPARTMENT and INS, and the denial of such access by defendants is without lawful basis.

32. Plaintiffs have exhausted their administrative remedies pursuant to Title 5 U.S.C. section 552 (a) (6) (C).

COUNT II. FOIA VIOLATIONS FOR FAILURE TO PROVIDE REPORTS OF INVESTIGATORY TRIPS TO HAITI

33. An INS spokesman reportedly told *The Miami Herald*, "INS routinely sends inspectors to Haiti to interview people who have been returned by American authorities. In the most recent survey in September", he said, "failed emigres reported no persecution since their return". (Copy of *The Miami Herald* story, December 31, 1984, attached hereto as Exhibit J).

34. A FOIA request was filed with INS in Miami by plaintiff, MICHAEL D. RAY, on February 28, 1985, requesting copies and listings of the reports and trips to Haiti by INS inspectors identified in the preced- paragraph herein (copy of the 2-28-85 FOIA request attached hereto as Exhibit K).

35. Defendant INS failed to produce, within the ten (10) days allowed by law, copies of reports and lists of trips by INS inspectors to Haiti.

36. Instead, contrary to its lawful obligations under FOIA, Miami INS directed plaintiff to submit his

2-28-85 request to the STATE DEPARTMENT in Washington, D.C., twenty one (21) days later, on March 21, 1985 (copy of INS' non-answer to plaintiff's 2-28-85 FOIA request attached hereto as Exhibit L).

37. Upon information and belief, INS' tale to *The Miami Herald*, supra, was a figment of INS' imagination and deliberate propaganda to trick the public and the immigration judges into believing falsely that Haitians deported to Haiti were not persecuted, received not even "a slap on the wrist", and therefore had no lawful grounds for political asylum under controlling law.

38. The above-described false propaganda issued by defendants acting in concert denied the plaintiffs a fair due process hearing before the immigration judges.

39. On June 12, 1985 plaintiff RAY forwarded a copy of the above 2-28-85 FOIA request to the State Department where it was received on June 15, 1985 (copy of return receipt attached hereto as Exhibit H).

40. Almost two years later, on March 2, 1987 the STATE DEPARTMENT responded to the FOIA request claiming that "searches of all referenced record systems have been completed, and have resulted in the retrieval of no documents that are responsive to your request." (copy of letter dated March 2, 1987 attached hereto as Exhibit M).

41. On February 18, 1987, defendant STATE DEPARTMENT received a FOIA request filed by Audate (which was identical to RAY's previous request) requesting records of the investigatory trips to Haiti to determine what happens to Haitian returnees. (Copy thereof attached hereto as Exhibit N). An

"answer" to this request dated April 21, 1987 was received by plaintiffs. (copy attached hereto as Exhibit O).

42. Unlike the STATE DEPARTMENT response to RAY, Defendant STATE DEPARTMENT responded to Audate's request by stating that "Michael D. Ray has multiple FOIA request [sic] with the Department. Please be more specific in describing the records you are requesting."

43. On April 24, 1987 Audate resubmitted his FOIA request to the STATE DEPARTMENT for an appropriate answer. (copy attached hereto as Exhibit P).

44. On May 8, 1987 defendant STATE DEPARTMENT received FOIA requests filed by Nicolas and Louiseau requesting records of the investigatory trips to Haiti to determine what happens to Haitian returnees. (copies attached hereto as Exhibit Q).

45. In a letter dated May 21, 1987 the STATE DEPARTMENT, rather than providing the requested records, stated that it had completed a project of compiling documents "concerning Haitian Refugees", without specifying if the requested records were included in these documents, or when, if ever, these records would be made available to plaintiffs. (copy thereof attached hereto as Exhibit R).

46. If, in fact, the records sought by plaintiffs are contained in the documents referred to in said response of defendant STATE DEPARTMENT, the possession of those records by defendant contradicts its earlier statements that it did not have these records when RAY had requested them 2 years previously.

47. Plaintiffs are entitled to the list of trips and reports in the possession of the STATE DEPARTMENT and/or INS requested in their FOIA requests above, concerning what happens to Haitian deportees.

48. Defendants are required by law to provide said information within ten (10) working days of a FOIA request, and their refusal to do so is without lawful basis.

49. Plaintiffs have exhausted their administrative remedies pursuant to Title 5 U.S.C. section 552 (a)(6)(C).

COUNT III. REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST UNFAIR ASYLUM PROCEDURES

50. Motions have been filed by plaintiff RAY before defendant EOIR to extend final deportation/asylum hearings of numerous Haitians on the grounds that the government has not answered the FOIA requests that are the subject matter of this particular lawsuit. Said motions have been denied by all five of the Immigration Judges in the Miami District. (One Miami immigration judge recently granted the motion but expressly only for *that* case and warned he would not grant such a motion for others).

51. Without being allowed access to the requested FOIA information, black Haitian political asylum applicants are unable to present material evidence in their political asylum hearings before the immigration court and therefore (i) are judged in a prejudicial hearing, (ii) suffer irreparable harm, and are therefore (iii) victimized on account of their race.

52. An almost universal result of said procedures by defendants is (i) the exclusion and deportation of black Haitians by defendants, and (ii) denial of their claims for political asylum and withholding of deportation.

53. The failure of EOIR to provide a hearing based on all relevant information known by them as well as the FOIA information defendants are required by

law to provide has caused irreparable harm to the plaintiff class and will continue to do so, in that other black Haitian refugees presently before the EOIR are likely to be deported as a result of defendants' recalcitrant failure to comply with the law and plaintiff's FOIA requests.

54. Defendants' (i) failures to honor the FOIA requests, (ii) failure to make available relevant evidence regarding the persecution of Haitian returnees, (iii) propaganda developed for public consumption and the (iv) false and/or non-existent statements made before the EOIR about how safe it is for Haitians to return to their homeland, may result in corporal or capital punishment to black Haitians upon their deportation and/or exclusion to Haiti.

55. Plaintiffs herein face immediate and irreparable harm in that they face imminent deportation to an unknown and perhaps deadly fate based on unfair procedures that do not comply with due process and federal law.

56. Defendants know from their own records that many of these Haitian plaintiffs are unemployed and/or too poor to pay legal expenses arising in any appeal of the final order of deportation and denial of their asylum claims or other possible federal court proceedings.

57. There is a strong and reasonable likelihood that plaintiffs will succeed on the merits in this case.

58. The information sought pursuant to the FOIA requests is possessed by the defendant(s) and is relevant and material to the claims for political asylum raised by plaintiffs and to the procedures required by due process of law in their hearings.

59. Any possible harm to the defendants is far outweighed by the benefits to be gained by plaintiffs in this case. There can be no harm caused to defend-

ants who are required under law to provide the information requested.

WHEREFORE, plaintiffs request this Court:

1. to take jurisdiction of this cause,
2. to order defendants to provide plaintiffs with the FOIA requested documents for the purpose of inspection and copying.
3. to expedite this proceeding as provided in Title 5 U.S.C. section 552(a)(4)(D).
4. to enjoin the final deportation and exclusion hearings of the members of the plaintiff class until such time as defendants have provided the FOIA requested information and for a period of at least six (6) months thereafter, so plaintiffs can study, analyze and verify defendants' reports as to what happens to returnees to Haiti,
5. to declare unlawful defendants' failure to provide the required information, and hearing procedures without such information,
6. to enjoin the dissemination of disinformation by defendants to the public and mass media concerning the fate of Haitian returnees.
7. to award plaintiffs their costs and reasonable attorney fees in this action, and to grant such other relief as this Court may deem just and equitable.

Respectfully submitted,

/s/ Michael D. Ray
MICHAEL D. RAY, ESQUIRE
Attorney for Plaintiffs
Miami National Bank
Building
8101 Biscayne Boulevard
Suite 500
Miami, Florida 33138

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Complaint was caused to be served by mail this 3rd day of June, 1987 upon Mr. Brian O'Leary, Esquire Special Assistant U.S. Attorney, 155 South Miami Avenue, Miami, Florida 33130.

/s/ Michael D. Ray
MICHAEL D. RAY,
Attorney for Plaintiffs

Miami News Editorial Page 3-12-85

Howard Kleinberg
Editor

Returned Haitians' fate still controversial

One day U.S. Immigration Commissioner Alan Nelson, speaking with The Miami News Editorial Board, declared there has not been one documented case of persecution of a Haitian refugee who has been returned to his native country. The next day I received a report from Amnesty International which said, in part, "Amnesty International quoted eyewitness counts of such people (illegal departures) being arrested and beaten until they were bruised and bloody after bad weather forced their boat back to shore."

I don't mean to make light of such a serious subject, but this contradiction reminds me somewhat of watching an instant replay of an alleged pass interference penalty: Sometimes it looks like the defender really interfered, and other times it looks like he never touched the other guy. Nothing you see is conclusive.

Nelson and Miami INS district director Perry Rivkind made all the proper statements to shore up their argument that Haitians being sent back by U.S. authorities simply are allowed to blend into the countryside without so much as a wrist-slap for their efforts to flee to the United States.

To stress how much he believes that, Rivkind even offered to provide names of 600 Haitians who have been sent back so that doubters can go to Haiti and speak to the people directly.

He said he made such an offer to prominent Miami blacks not long ago when they spoke with him about their concerns for the returned Haitians. Bob Simms, former director of the Community Relations Board and now a public relations consultant, confirmed that Rivkind made

such an offer but said he did not accept it or turn it down. Instead, he claimed, he told Rivkind that national black leaders were more qualified than a Miami public relations man to conduct the Haitian inquiry.

(This evokes an old argument between me and Jesse Jackson. Jackson goes everywhere but Haiti: you can find him in Syria, Cuba, Nicaragua—but never in Haiti. Why?)

The allegation by Amnesty International of returning Haitians being beaten is but one of many claims in its report. Others deal with dissidents in the island who suffer arrest, tortue and political killing as well as disappearances and being held incommunicado for long periods.

For the record, Rivkind tried to be diplomatic about the Amnesty report but sounded defensive: "Perry Rivkind doesn't send people back to be hurt. If ever I hear of it, I'll go public."

Instead, he questioned the time period of the Amnesty International report. When I checked his claim, I found he was on target. Most dates used by Amnesty International in the short press release are in the late 1970s. The most recent date used was December 1982, although there was a reference to Amnesty receiving reports of 25 arrests in November 1984.

An Amnesty International spokesperson in New York confirmed that a lot of the information in the report is old. "What's new about it," she said, "is that Amnesty issued the report."

This is somewhat disappointing to those of us who previously have given special credence to Amnesty International reports.

But when the INS people contend the report is old, are they not also admitting that in the recent past, this type of activity did exist in Haiti?

And how long ago is "old"? Are we to believe that although there was torture in December 1982 there is

none now? That is what the State Department is contending in its annual report on other nations, issued on Feb. 14.

No political killings in Haiti in 1984, said State, no disappearances in 1984.

Why the sudden change since 1982?

As the lady from Amnesty said: "Some of the incidents may be old, but they ain't that old!"

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

[Emblem]

7880 Biscayne Blvd.
Miami, Florida 33138
MIA870114

March 30, 1987
Mr. Ives Audate
1455 N.W. 195th Street
Miami, Florida 33169

Dear Mr. Audate:

Please refer to your Freedom of Information request, received by this office on February 19, 1987, for the indentification of the 600 Haitians referred to in the Miami News article by Howard Kleinberg, Editor, dated March 12, 1985. In regard to this reference, Perry A. Rivkind, District Director, Immigration and Naturalization, Miami, has stated that he was misquoted by the Miami News. You have also requested, if we cannot identify the aforementioned 600 Haitians, that we provide you with the identification of at least 200 other Haitians who have been deported within the past twelve months.

The records of the Immigration and Naturalization Service are indexed and maintained by name and alien or citizen or employee identification number. We do not maintain lists such as the ones you seek, therefore we do not have the records to satisfy your request.

We regret that we are unable to be of assistance to you in this matter.

Sincerely,

/s/ Margaret Snyder
MARGARET SNYDER
FOIA Assistant

The Miami Herald, Monday, December 31, 1984

INFLUX OF HAITIANS PUZZLES U.S. OFFICIALS

Calm seas or stormy politics: Everyone has an explanation

By MARC FISHER
Herald Staff Writer

In less than a week earlier this month, the Coast Guard intercepted 671 Haitian refugees making desperate journeys to the United States on four boats, including a workboat named Jerusalem and a freighter called Deliverance.

That's nearly as many Haitians as the Coast Guard captured in all of 1982 and 1983. It's also more Haitians than entered this country in those two years.

In the days following those episodes, 20 Haitians ran aground at the Julia Tuttle Causeway and hailed taxicabs to make their getaway. Two dozen Haitians crammed into a speedboat were caught after they docked at the 79th Street Causeway. And 18 more refugees from the impoverished island beached a rickety wooden powerboat near the nuclear power plant on Hutchinson island in St. Lucie County.

The Krome Avenue detention camp now holds 407 Haitian emigres, 86 of whom arrived within the past month.

Clearly, something has convinced a great many Haitians that now is the time to emigrate to the United States—in spite of the Coast Guard's vigorous interdiction program. In spite of an uncertain and probably gloomy legal future for Haitian immigrants, in spite of the Reagan administration's firm policy of confining arriving Haitians at Krome Detention Center.

The sudden influx of Haitians, stuffed onto flimsy boats with insufficient food and water, has caught the

U.S. government by surprise. A perplexed Immigration and Naturalization Service (INS) sent a team of investigators to Haiti early this month to figure out what's happening. The State Department sent its embassy in Port-au-Prince a flurry of queries asking why the boat people are setting sail for Miami.

Between them, the government and leaders of Miami's Haitian community have nearly a dozen theories explaining the influx. No theory is backed by much in the way of solid evidence. Each has its detractors.

Haitian exiles in Miami say the refugees are being pushed out by factors at home. Things must be getting worse in Haiti, either economically, politically or both, they say.

Federal officials say conditions in Haiti are lousy, but fairly stable. The United States is the magnet, they say.

And then there's the weather.

Forget politics, forget interdiction, forget the Haitians' legal status. What's causing the largest movement of Haitians since 1981 is calm seas, according to this theory.

"The weather is an important factor," said a State Department

Please turn to HAITIANS/3A

SUDDEN INFLUX OF HAITIANS PUZZLES U.S. OFFICIALS

Haitians!from 1A

official who spoke only when guaranteed anonymity. "Come January, the winds turn against sailors coming from Haiti. They had some uncertain weather in the early fall. Since then, the seas have been in their favor."

And INS spokesman Duke Austin said October and November "have historically been major months for immigration. That's the condition of the seas."

But Austin's own colleagues don't buy his explanations.

"We've had the same weather conditions the last three years and we've never experienced anything like this

before," said Leon Jennings of the INS Refugee, Asylum and Parole Unit. "This upsurge was not due to weather conditions."

The thory that draws the most widespread support is simple: As Haitian communities in Miami and New York City have grown and matured, Haitians are sending more money to relatives and friends back home. Along with the money, they send cassette tapes and letters telling of new jobs, schools, a higher standard of living—all the lures that have attracted immigrants for centuries.

A more-established Haitian community in the United States is also better able to provide newcomers with legal advice, health care and other help.

Henri-Robert Lamothe, executive director of Miami's Haitian Task Force, said the only plausible explanation for the influx "is the Haitian's view of the good life here and the bad conditions there."

"The more families settle here, the more others will be attracted to come here," said Perry Rivkind, director of the Miami INS office.

"The word is out that it's worth a try," the State Department source said. "If you make it to Florida, you're home free, you don't need a visa. If you get taken to Krome, you get taught English and get fed well. If you're caught by the Coast Guard, you're treated well and you're not prosecuted by the Haitian government when you're returned."

Whatever the reason, the fact of the influx is undisputed.

"There is a tremendous increase in efforts to come to this country," Rivkind said.

The Coast Guard's interceptions of Haitians at sea are way up: In 1982, they caught 152 Haitians. In 1983, it was 651. This year, through Dec. 3, a total of 3,706—with more than a third of them since November. And that's not including at least 400 Haitians captured on the way to Florida or upon arrival since Dec. 3.

INS' figures for Haitias who elude the Coast Guard and arrive in Florida have also drastically increased: The 1980 high of 15,093 Haitian arivals decreased to just 134 in 1982. In 1983, INS accounted for 333 Haitians. This year, the figure was 825 through November.

[Illegible] the Bahamas and other intermediary points is also on the rise.

> 'Traditionally, we have seen an increase in influx whenever there is political unrest in Haiti.'
>
> Roger Biamby,
> Haitian leader

Interceptions of Haitians at sea are way up: In 1982, the Coast Guard caught 152. Through Dec. 3 this year, 3,706 were caught.

In Miami, Haitian leaders say the influx may be even larger than government statistics reveal. Roger Biamby, executive director of the Haitian American Community Association of Dade (HACAD), said his organization has seen a sudden, large increase in requests for food packages and other aid.

"Traditionally, we have seen an increase in influx whenever there is political unrest in Haiti," said Biamby.

He said the government has recently launched a new effort to destabilize opposition churches and pastors. The State Department says reports from its embassy in Port-au-Prince indicate no such crack-down.

The Rev. Tom Wenski, director of Miami's Haitian Catholic Center, theorizes that the Haitian government is allowing more citizens to leave the country in an effort to pressure the United States into providing more aid. He says economic and political hardships in the island nation are worsening.

"It's a case where people who were on the edge of survival are being squeezed a little more," Wenski said. "The only way to go is out."

But experts on the State Department's Haitian desk and at INS say they know of no significant changes in policy by the government of President-for-Life Jean Claude Duvaller.

Haiti's consul general in Miami, Alexandre Paul, did not return The Herald's calls last week.

There are nearly as many theories about the influx as there are experts on Haitian immigration. Here are some possible explanations, along with arguments for and against each.

The Backfire Theory: The *Rev.* ——— -Juste, executive director of Miami's Haitian ——— Center, says the Reagan administration's interdictioin program is inadvertently causing more Haitians to flee [Illegible]

"By sending Haitians back, that creates more tension in Haiti, more people subject to persecution," he said. "Now the only alternative is to escape at any price."

But Jennings said INS routinely sends inspectors to Haiti to interview people who have been returned by American authorities. In the most recent survey in September, he said, failed emigres reported no persecution since their return.

The Simpson-Mazzoli Theory: Advanced by Gregory Smith, chief of immigration planning for the U.S. Cuban-Haitian Entrant Program, this explanation says that Haitians have heard that the successor to Congress' immigration reform bill is likely to be an early topic of discussion in the 99th Congress. Smith also said Haitians have heard news of the recent Cuban Adjustment Act and are hoping that they might be the beneficiaries of another, similarly helpful turn in their legal status in the United States.

Haitian leaders in Miami scoff at that theory, saying most immigrants are not attuned to the intricacies of U.S. politics. Don Loopey, INS' Haitian coordinator in Washington, said he tried but failed to find out what news Haitians were hearing when he visited the island a few weeks ago.

The Misinformation Theory: Widely accepted by government officials, this theory says that Haitians have believed for the past few months that the Coast Guard's interdiction efforts were put aside while the Guard's cutters and planes concentrated on an anti-drug smuggling campaign.

Though the Coast Guard has not shifted resources away from interdiction, the U.S. Embassy has reported that is exactly what many Haitians believe.

To combat the misimpression, U.S. representatives are asking Haitian newspapers and radio stations to announce that interdiction continues and that Haitians who make it to Florida will be detained at Krome.

INS official Jennings also said that Haitians in the United States are misleading their friends and relatives back home into thinking that they will flourish here. But Jean-Juste said that, to the contrary, he and other Haitians are encouraging their countrymen to emigrate only if they are facing political repression, not if they want to leave solely for economic reasons.

For whatever reason, the Haitians continue to flee their homes. Some are caught and returned. Some clog already-overcrowded Krome. Some slip through and disappear into exile communities in Miami and New York.

But some—no one knows how many—end up drowned in the Caribbean, victims of unscrupulous boat owners who play on their dreams of America. It is for their benefit, government officials say, that the new influx should be stemmed.

"Look at the number of boats the Coast Guard finds that are in really bad shape," the State Department source said. "We speculate that quite a few are ending up on the bottom of the Caribbean Sea."

Herald Staff Writer Yves Colon also contributed to this report.

[Emblem]

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

7880 Biscayne Blvd.
Miami, Florida 33138

July 15, 1985

Mr. Michael D. Ray
Attorney at Law
Suite 202
7630 Biscayne Boulevard
Miami, Florida 33138

Re: Your letter of July 3, 1985 and telephone conversation of July 8, 1985.

Dear Mr. Ray:

This is to formally inform you of gross inaccuracies in your referenced letter.

Several points need reiteration to set the records straight regarding the paragraph in question as quoted by you on December 31, 1984 *Miami Herald* article: first, The Miami Herald did not directly quote Mr. Jennings; secondly, the Miami District Office *does not* routinely or otherwise send inspectors to interview Haitians who have been returned by U.S. authorities as such interviews are conducted by the American Embassy, Port-au-Prince; thirdly, any statements purportedly made by Mr. Jennings should be verified by Mr. Jennings.

The Department of State has reported that there have been no reports of persecution against Haitian nationals interviewed after their return under the Interdiction Agreement.

In regard to your statements of your Freedom of Information request, as you well know, there has been a change

in the staffing of that office and when your problem was brought to my attention it was handled promptly. Your negative FOIA response noted that no such documents existed in the Miami District Office and that our Central Office had given a similar negative response upon our inquiry. Furthermore, you were verbally informed by me to proceed to seek such information from the Department of State if you so desired.

I trust this will resolve misunderstandings or misconceptions you may have had.

Sincerely,

/s/ George M. Waldroup
GEORGE M. WALDROUP,
Assistant District Director

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 86-2430

MICHAEL RAY, ESQUIRE, individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICHOLAS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE, and the United States Department of State, DEFENDANTS

DECLARATION OF JOHN EAVES

I, John Eaves, declare and state as follows:

1. I am the Acting Deputy Director of the Office of Mandatory Review of the Classification and Declassification Center (A/CDC) of the Department of State. In that capacity, I am responsible, *inter alia*, for the review of Department of State documents pursuant to the Freedom of Information Act, 5 U.S.C. 552 (FOIA). I am authorized to classify material to the Top Secret level and to downgrade and declassify national security information pursuant to Executive Order 12356 and Department of State regulations set forth in 22 C.F.R. Section 9.14. I have personally reviewed the portions of documents withheld from release by the Department of State

in responding to the plaintiffs' requests and described in this declaration. I make the following statements based on that review, on my personal knowledge and professional judgment, and on information made available to me in the performance of my official duties.

2. I am familiar with the subject litigation and the requests filed under the Freedom of Information Act with the Department of State by Messrs. Michael D. Ray, Ives Audate, Jean Hevil Loiseau and Yvon Nicolas. I submit this declaration to demonstrate that the information withheld is properly exempt from release under FOIA. The documents at issue are submitted as attachments 1 through 17 to this declaration.

3. In response to Mr. Ray's FOIA request, dated June 10, 1985, identified hereafter as FOIA Case No. 8502478, the Department reviewed 25 documents that were found in its files and identified as relevant to the request. Upon completion of this review, eight documents were released in full and seventeen documents were released with excisions. (See letter to Mr. Ray, dated July 3, 1987, Exhibit A.) The Department found no documents responsive to a second FOIA request filed by Mr. Ray dated June 10, 1985 (FOIA Case No. 8502479). This request is addressed in the declaration, dated September 22, 1987, which was submitted by Mr. Frank M. Machak, Chief of the Information Access and Services Division of the Foreign Affairs Information Management Center of the Department (FAIM/IS).

4. The Department subsequently received a FOIA request from Mr. Ives Audate, dated February 11, 1987 (FOIA Case No. 8700798), for the same documents which had been released to Mr. Ray. Accordingly, the Department responded to Mr. Audate by releasing in full the same eight documents and the same seventeen documents with excisions that it had released to Mr. Ray. (See letter to Mr. Audate, dated September 3, 1987, Exhibit B.)

5. The Department received a FOIA request filed jointly by Jean Hevil Loiseau and Yvon Nicolas, dated

May 6, 1987 (FOIA Case No. 8702233). This request was identical to the previous FOIA request submitted by Mr. Ray, and the Department responded by releasing in full the same eight documents and in part the same seventeen documents to Messrs. Loiseau and Nicolas that it had released to Mr. Ray. (See Department's letter dated September 17, 1987, Exhibit C.)

6. The Department of State carefully reviewed the seventeen documents withheld in part in the three requests identified above and has released all information not subject to an exemption. All withholding of information as a result of this review was based on a single FOIA exemption: (b)(6).

7. The seventeen documents which previously were withheld in part were reviewed again in connection with this litigation. A small amount of previously withheld information was released from sixteen of them to Messrs. Ray, Audate, Loiseau and Nicolas in letters dated October 19, 1987 (Exhibit D.) This information, while incidental and nonsubstantive, is reasonably segregable from the personal identifying information that continues to be withheld from the documents under Paragraph (b)(6) of Section 552.

8. *Exemption (b)(6)—personal privacy.* FOIA exemption (b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Deletions of names and identifying information have been made in documents in this case to protect the privacy of Haitians who consented to interviews by Embassy officers following their return to Haiti after failed attempts to enter the United States without documentation. The interviews were required to ascertain whether the Haitian Government was submitting returned Haitians to harassment or ill treatment. While no evidence of harassment or other ill treatment of the returned Haitians was reported, those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality. To disclose the identities of these individuals would not only betray their trust in our discretion, it would also subject them or their families to possible embarassment in their social and community relationships. This would be a clearly unwarranted invasion of the privacy of the individuals concerned. The FOIA (b)(6) exemption has been invoked to prevent individuals or their families from being thus exposed. In all instances in which this exemption is asserted, I have carefully weighed the privacy interest of the individuals against the public interest in disclosure, and have determined that the former outweighs the latter.

9. One document (No. 71) was released to Mr. Ray, and subsequently to Messrs. Audate, Loiseau and Nicolas, with the notation "RXN". "RXN" is an internal usage which signifies that material extraneous or irrelevant to the request has been deleted from a document which has otherwise been released in full. It has been our practice to inform the requester whenever irrlevant material has been excised. Through inadvertence, a sentence explaining the "RXN" notation on document 71 was omitted in our letters to Messrs. Ray Audate, Loiseau and Nicolas.

10. A description follows of each of the seventeen documents withheld in part.

Document Nos. 12, 18, 20, 21, 46, 49, 54, 56, 57, 58, 62, 64, 67, 70, 72, 73, 74 (Attachments 1 through 17).

Attachment No. 1. Document No. 12 is a Memorandum to the File, dated July 1, 1983 from the Returnee Officer at the United States Embassy at Port au Prince, Haiti. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 2. Document No. 18 is a Memorandum to the File, dated October 18, 1983 from a Political Officer at the United States Embassy at Port au Prince, Haiti. Five pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 3. Document No. 20 is a Memorandum to the File, dated December 8, 1983 from a Political Officer at the United States Embassy at Port au Prince, Haiti. Twenty-one pages. Originally and currently *UNCLASSIFIED*. Withheld in part.

Attachment No. 4. Document No. 21 is Telegram No. 0082, dated January 9, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to: Coast Guard District Seven, Miami, Florida; the Immigration and Naturalization Service Headquarters, Washington, D.C. and its Office in Miami, Florida; Commandant, United States Coast Guard; Coast Guard Cutter Hamilton; and Commander, United States Forces Caribbean, Key West, Florida. Six pages. Originally and currently LIMITED OFFICIAL USE. Withheld in part.

Attachment No. 5. Document No. 46 is Telegram No. 6055, dated October 26, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State. Three pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 6. Document No. 49 is Telegram No. 6466, dated November 21, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State. Three pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attacment No. 7. Document No. 54 is Telegram No. 6892, dated December 14, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State, with an information copy to the Immigration and Naturalization Service Office at Miami, Florida. Four pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 8. Document No. 56 is Telegram No. 6992, dated December 18, 1984 from the United States Embassy at Port au Prince, Haiti to the Department of State, with an information copy to the Immigration and Naturalization Service Office at Miami, Florida. Six

pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 9. Document No. 57 is Telegram No. 251, dated January 15, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 10. Document No. 58 is Telegram No. 444, dated January 24, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida, Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 11. Document No. 62 is Telegram No. 1104, dated February 27, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven, at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 12. Document No. 64 is Telegram No. 1336, dated March 12, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven at Miami, Florida. Four pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 13. Document No. 67 is Telegram No. 1563, dated March 20, 1985 from the United States Embassy, at Port au Prince, Haiti to the Department of

State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven, at Miami, Florida. Five pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 14. Document No. 70 is Telegram No. 1752, dated March 28, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 15. Document No. 72 is Telegram No. 2266, dated April 25, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 16. Document No. 73 is Telegram No. 2387, dated May 3, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

Attachment No. 17. Document No. 74 is Telegram No. 2899 dated May 29, 1985 from the United States Embassy at Port au Prince, Haiti to the Department of State, with information copies to the Immigration and Naturalization Service Headquarters at Washington, D.C. and Coast Guard District Seven Headquarters at Miami, Florida. Two pages. Originally and currently UNCLASSIFIED. Withheld in part.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 21st day of October 1987.

/s/ John Eaves
JOHN EAVES

[Attachments 1-6 Omitted in Printing
and Lodged with the Court]

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Nos. 86-2430-CIV-ALH
and 87-2087-CIV-ALH

MICHAEL D. RAY, PLAINTIFF

vs.

U.S. DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

Miami, Florida
March 1, 1989

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID DYER

APPEARANCES:

For the Government:

MICHAEL D. RAY
In Pro Se

For the Defendants:

LYNN SUMMERS,
Assistant U.S. Attorney

* * * *

[24] THE COURT: What do you have to say about the redacted statements?

MS. SUMMERS: Once again, Your Honor, I have not personally reviewed them.

THE COURT: The only thing that is redacted in [25] them is they failed to disclose the names of the people from whom the statements were taken.

MS. SUMMERS: I understand, and my response to that is that the plaintiffs' purposes would not be advanced with the mere information as to those names, without some other information as to where those people could be found.

* * * *

[34] THE COURT: Well, I am going to go ahead and rule in this case, and so that the record will be complete, I want to have the record indicate the basis for my ruling.

* * * *

[35] But there is a claim for exemption, which are the seventeen statements, the names of which have been redacted.

The Freedom of Information Act request triggers a claim of exemption under the Act, and the burden is on the government agency to demonstrate the basis for the non-disclosure.

A justiciable issue remains to be decided, and that is the propriety of the State Department's claim of [36] exemption under 552(b)(6) because the District Court must do something more to assure itself of the factual basis and the bona fides of the agency's claim of exemption than rely solely upon an affidavit.

There is a presumption, under the Freedom of Information Act, that government documents held by a government agency are subject to disclosure.

There must be a detailed proof that the disclosure would defeat, rather than further, the purposes of the Freedom of Information Act, and whether the disclosure constitutes a clearly unwarranted invasion of privacy, the Court must employ a balancing test weighing the individual's right to privacy against the public interest in disclosure of the government information.

The degree of invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical. It must be more than a mere possibility, and the agency's promise of confidentiality to the submittor of information is insufficient to defend against disclosure.

In this instance, the INS has responded that it did not conduct an—that it did not conduct investigatory trips to Haiti, nor have in its possession investigative reports.

[37] It also has maintained, by its answer, that the list of six hundred Haitians does not exist.

I think the record fails to disclose that the records have been improperly withheld or that they, indeed, exist.

Also, the record indicates there have been no requests directed at EOIR, and, therefore there is no issue before me in connection with that party.

As I have indicated, I think the Robles case holds that the promise of confidentiality is insufficient. I find it difficult to see how that disclosure in this case could cause the plaintiffs any harassment, embarrassment or danger, and this country's immigration policy supports a finding that the public has a legitimate interest in the save re-location of returned Haitians.

I think any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation, and the promise of confidentiality by the State Department is only one factor to be considered and not determinative of the outcome.

Weighing the public interest against the private interest, the balance tilts in favor of disclosure of the names, because any intrusion into the privacy of the Haitian Nationals would be minimal.

I am, therefore, going to require the government, [38] within fifteen days, to supply the redacted information in the seventeen documents.

MR. RAY: Thank you.

THE COURT: I am going to grant the summary judgment with respect to the information sought and explained or shown to be non-existent.

I am going to withhold entering of any judgment, however, until the fifteen days has expired and a showing has been made to this Court that the names have been furnished to the plaintiffs, and, if they have not, then I will take further appropriate action.

That is all.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 86-2430

MICHAEL D. RAY, ESQ., ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

DECLARATION OF RICHARD H. MELTON

I, Richard H. Melton, declare and state as follows:

1. I am the Deputy Assistant Secretary for Inter-American Affairs. In this capacity I assist the Secretary of State in providing overall direction, coordination, and supervision of interdepartmental activities within this geographic area. I am responsible for ensuring the adequacy of U.S. policy for the countries within the Caribbean region, and for the plans, programs, resources, and performance for implementing that policy. My duties include supervision of the Department's policy and operations with respect to Haiti, as well as other Caribbean countries. I am familiar with the facts of this case and have reviewed the documents which are the subject of this litigation.

2. I submit this declaration in support of the government's Motion for Reconsideration of the court's order of March 3, 1989, requiring the Department of State to disclose the names of those Haitians who were interviewed by U.S. Government personnel following their interdiction at sea and return to Haiti. These persons

were interviewed approximately six months after their return to Haiti about the experiences they had had since their return and the conditions under which they were living, on the understanding that their identities would be kept confidential. Protection of the identities of confidential sources of information is essential to the U.S. government's ability to enforce its immigration laws and successfully carry out the foreign policy interests of the United States.

3. On September 23, 1981, the Government of the United States entered into a law enforcement agreement with the Government of Haiti to stop the illegal migration of Haitians to the United States. (The Agreement is attached as Exhibit 1.) That agreement provided for various cooperative law enforcement measures, including the interdiction by U.S. Government authorities of Haitian flag vessels on the high seas, inquiries regarding the status of those on board, and the return of the vessels and persons aboard to Haiti if a violation of U.S. or Haitian law is discovered. The agreement included an undertaking by the Government of Haiti not to prosecute for illegal departure any of the returnees who are not traffickers. The U.S. Government stated its intention in the agreement not to return any Haitian migrants "whom the United States authorities determine to qualify for refugee status." The U.S. Government has a strong desire to see that all elements of the law enforcement agreement are carried out, and related U.S. interests are advanced.

4. On September 29, 1981, the President issued Executive Order 12324 on the "Interdiction of Illegal Aliens," (attached as Exhibit 2) which instructed the Secretary of State to enter into "cooperative agreements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." The Order also instructed the "Department in which the Coast Guard is operating [to] issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens." The Order stated that the Coast Guard shall "stop and board vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action." The Order stated further that the vessel and its passengers shall be returned to the country from which it came "when there is reason to believe that an offense is being committed against the United States immigration law, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent."

5. For important foreign policy reasons, the United States Government also has a very strong political interest in assuring that no person, except traffickers, returned by the Coast Guard to Haiti is prosecuted, persecuted, or otherwise mistreated by the authorities for his departure. The United States plays a leading role in assuring humanitarian treatment of migrants and refugees in all parts of the world.

6. The Department of State has found it necessary in the past and may find it necessary in the future to interview certain Haitians returned by the U.S. Coast Guard after being interdicted at sea in order to ascertain whether they have been persecuted or otherwise mistreated, or were prosecuted by the Government of Haiti for their departure. The United States has conducted these interviews to assure that Haiti's undertaking under the 1981 Agreement not to prosecute returnees who are not traffickers has been carried out. Such interviews also provide the United States with valuable information about conditions in Haiti and provide means of verifying whether the screening measures instituted pursuant to the Presidential Order to ensure that *bona fide* Haitian refugees are not returned to Haiti without their consent are effective. Finally, such interviews have been essen-

tial to assure that important U.S. foreign policy objectives are being met by the Haitian interdiction program.

7. The procedures for obtaining the interviews was as follows. When a vessel was interdicted and it was ascertained that the persons on board did not have a *bona fide* claim for refugee status, the vessel and its passengers were returned to Haiti. Upon arrival in Port-Au-Prince, an embassy official obtained the names and addresses of all returnees. Department of State personnel from the Embassy conducted follow-up interviews with the returnees, usually about six months after their return. All interviews were undertaken for the purpose of determining the treatment the returnees have received from the government of Haiti after or as a result of their return to Haiti. The officers were instructed to visit several towns in different parts of the country in order to ensure a representative sample. About 27% of the returnees were located and agreed to be interviewed. The interviews in this case were conducted with the clear understanding that they would be held confidential. The interviewees generally were informed that the purpose of the follow-up interviews was to monitor the well-being of the returnees.

8. If the names of these returnees were to be released to the public, subjecting them to harassment and questioning by strangers, word would quickly spread that the United States cannot be trusted to protect the identity of sources of information. Without this essential trust, the United States could lose its ability to monitor conditions under which persons returned to Haiti are treated, thereby undermining one of the principle undertakings of the agreement, rendering compliance with the Presidential Order uncertain, and jeopardizing important foreign policy objectives. Other Haitians or third country nationals on whom the United States relies for candid and frank assesments of internal conditions would be reluctant to believe in a U.S. promise of confidentiality, and thus no longer be willing to provide the U.S. information

it needs to effectively conduct law enforcement programs or to attain foreign policy objectives.

9. I believe that release of the names of these sources of information necessary to the successful conduct of U.S. foreign policy could reasonably be expected to cause damage to the foreign relations of the United States and therefore meet the criteria for classification under Executive Order 12356 1.3(a)(5). I have requested a review of the documents for classification pursuant to section 1.6(a) of the Executive Order.

10. If Haitians interviewed had been aware that their names and statements could be made public and might be used in political asylum proceedings, either on behalf of or against fellow Haitians, the interviewees might have been far less candid in nature. Had the U.S. government not been able to assure confidentiality of the names of interviewees, the United States would have been severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program.

11. Inability to preserve the confidentiality of sources of human rights conditions in foreign countries would also jeopardize the Department's ability to monitor human rights conditions in countries under sections 116(d) and 5023(b) of the Foreign Assistance Act of 1961, as amended. Furthermore, the Department's ability to render informed advisory opinions in asylum cases pursuant to 8 C.F.R. 208.7 would be constrained.

12. Without the ability to maintain confidentiality of names of persons who attempt to leave their country of origin, the U.S. political asylum and refugee programs would become jeopardized. Persons who might otherwise approach an embassy official with a claim of persecution, might fail to do so because of a fear that the claim could be made public. Our humanitarian and foreign policy interests in maintaining viable refugee and political asylum programs could be severely damaged.

13. In providing reports of interviews with the names expunged, the U.S. has given plaintiffs as accurate a ren-

dition of the conditions in which the interviewees found themselves at that time that the U.S. itself has. No effort has been made to expunge information other than identities. Plaintiffs have made no showing that the interview records are not accurate.

14. In addition to the demonstrated U.S. Government interest in protecting identities, there is good reason to believe that disclosing the names to plaintiffs will not have significant effect on the political asylum proceedings in connection with which the plaintiffs intend to use these names. The reports at issue here reflect interviews that took place at the latest in 1985. Conditions in Haiti have changed significantly since that time. In addition, it is likely that many interviewees can no longer be found in the same location. Thus release would result in damage to the U.S. credibility without any real benefit to present-day asylum seekers.

15. Moreover, the United States evaluates claims of political asylum based on current conditions in the country, and these interview reports, now between four and eight years old, are not a major factor in evaluating present conditions in Haiti and hence current claims for political asylum. Thus the public benefit to be gained from release of the names of the interviewees is likely to be minimal.

I declare that the foregoing is true and correct.

/s/ Richard H. Melton
RICHARD MELTON

17 March 89
Dated

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 86-2430

MICHAEL D. RAY, ESQ., ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

DECLARATION OF PRATT BYRD

I, Pratt Byrd, declare and state as follows:

1. I am the Acting Deputy Director of the Office of Mandatory Review in the Classification and Declassification Center (CDC") of the Department of State. In this capacity, I am responsible for the review of Department of State documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552. I am authorized, as a Top Secret classification authority, to classify information up to and through the level of Top Secret, and to downgrade and declassify national security information pursuant to Section 1.2 and 3.1 of Executive Order 12356 and Department of State regulations 22 C.F.R. 9.14. I make the following statement based on my personal knowledge and upon information made available to me in the performance of my official duties.

2. I am familiar with the Freedom of Information requests which are the subject of this litigation. I am filing this declaration to explain the recent classification of the names of Haitian returnees who were interviewed

in 1983, 1984 and 1985, with respect to their situation following their return.

Preliminary Statement

3. The documents at issue in this case were retrieved in 1987 and were reviewed at that time by CDC, which is staffed by experienced Foreign Service officers who have retired from the Service. These re-employed annuitants fully devote their time to review of documents under the various information access laws and regulations. These officers possess in-depth knowledge of the Freedom of Information Act and other information access statutes as well as Executive Order ("E.O.") 12356 governing classification. These officers, furthermore, have been endorsed by one or more of the Department's Bureaus to handle review of FOIA and Privacy Act requests of interest to their Bureaus.

4. When CDC first reviewed the documents in the late summer of 1987, it diligently sought background information on the Haitian returnees program pursuant to which the interviews were conducted, but was able to obtain only limited information. Based on the information material available to it and the documents themselves, it was CDC's determination that the names of the returnees interviewed should be withheld under Exemption 6 because their release, in the context of the interviews, would constitute an clearly unwarranted invasion of the personal privacy of those to whom the interview records pertain. This determination was set forth in the Declaration of John Eaves, dated October 21, 1987, and filed in support of Defendant's Supplemental Motion for Summary Judgment.

5. In early March of this year, after the Court expressed its intent to rule against the Department and order release of the names, the issue of whether or not to disclose the names was presented to the Acting Assistant Secretary for Inter-American Affairs. He examined the issue and strongly opposed the release of the names

based upon the foreign policy implications that such release would have. The matter was then reviewed by the Deputy Assistant Secretary for Caribbean Affairs, Richard H. Melton, whose views are set forth in his declaration, signed on March 17, 1989, and filed with this Court.

6. CDC was then instructed to review the documents to determine whether the information withheld from the documents met the criteria for classification. Based on a careful review of each of the documents and taking into account the factors set forth in the Melton Declaration, I have concluded that each of documents containing the names of the interviewees can be considered for classification because it constitutes information concerning foreign relations or foreign activities of the United States and information concerning a confidential source. I further have determined that release of the names reasonably could be expected to cause damage to the foreign relations and, therefore, the national security of the United States. Thus the names meet the criteria for classification under E.O. 12356.

Classification of the Names

7. Although these documents were not classified upon initial review, I have determined that they meet the criteria for classification. Therefore, the documents were classified under the procedures prescribed by E.O. 12356, Section 6.1(d) providing for classification of information after it has been requested under the FOIA. The classification was performed by myself, an official with Top Secret classification authority. After reviewing each document to ensure that it met the criteria for classification, I marked each document in accordance with the procedural requirements of E.O. 12356.

8. Section 1.3(a) of the Executive Order states that "[i]nformation shall be considered for classification if it concerns: . . . (5) foreign relations or foreign activities of the United States . . . [or] (9) a confidential source."

Section 1.3(b) states that information meeting these criteria "shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." Section 6.1(e) defines "national security" as the "national defense or foreign relations of the United States."

9. Section 1.3(c) states that the unauthorized disclosure of a confidential foreign source is presumed to cause damage to the national security. "'Confidential source'" means any individual or organization that has provided, or that reasonably may be expected to provide, information to the United States on matters pertaining to the national security, with the expectation, express or implied, that the information or relationship, or both, be held in confidence." Section 6.1(f).

10. The documents in this case are classified "Confidential." Section 1.1(a)(3) states that "'confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." In this case, the interviews were conducted on the understanding that the information would be used only for monitoring the treatment of the returnees and that the interviewees would not be publicly identified. The returnees are individuals who provided information to the U.S. on matters pertaining to "national security" with the expectation that that relationship would be held in confidence and, thus, meet the definition of confidential source. Disclosure of the names is presumed to cause damage to the national security. However, in addition to this presumption, there are indentifiable bases for a reasonable belief that damage to our foreign relations could occur as a result of disclosure of the names of the interviewees. Many of the facts upon which I relied in making my classification determination are set forth in the Declaration of Richard Melton which is hereby incorporated by reference into this Declaration.

11. Release of the names of persons who gave the interviews would make other persons in similar circumstances reluctant to speak with Embassy officials. The United States' ability to conduct interviews such as these is important to a number of U.S. foreign policy interests. First, the U.S. concluded an international agreement with Haiti in which the Haitian government bound itself not to persecute any of the returnees for illegal departure. The U.S. has a strong foreign policy interest in assuring that other nations with whom we enter into agreements comply with the terms of those agreements. When the obligations relate to treatment of persons, the most reliable method of monitoring compliance is to speak to those affected by the obligations.

12. Second, monitoring of the treatment of persons who attempt to leave their country of origin is an important tool for the U.S. in its efforts to assure humanitarian treatment of migrants and refugees in all parts of the world. In this case, there was no finding of harassment by the Haitian government. However, this information could be relied upon as truthful only if obtained upon the assurance of confidentiality.

13. Third, this type of interview was and continues to be important to assure that the U.S. is able to carry out its own laws, such as section 207 and 208 of the Immigration and Nationality Act, relating to political asylum and refugee admission of persons who have been persecuted or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Our inability to preserve confidentiality of sources who provide information on human right conditions would jeopardize the government's ability to monitor human rights conditions under the Foreign Assistance Act of 1961, as amended.

14. Fourth, the credibility of the U.S. would be damaged by release of the names, impairing the government's ability to obtain information about conditions and events in foreign countries generally, and thereby inhib-

iting the government's ability to anticipate and evaluate accurately changes in the local political scene which may have international ramifications. The government's in ability to represent with any degree of credibility that it can and will keep confidences regarding contacts with persons seeking to leave their country of origin could also impair the effectiveness of U.S. political asylum and refugee programs, not only with respect to Haiti, but with respect to other countries as well.

15. If the names of the Haitians who were interviewed are released, local citizens in Haiti, and possibly in other countries, will become less likely to speak freely with Embassy officials, which will cause damage to our foreign relations in the manner described above. Therefore, the names of the returnees who were interviewed are currently and properly classified under E.O. 12356 1.3.(a)(5) and (a)(9).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of March, 1989.

/s/ Pratt Byrd
PRATT BYRD

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 86-2430-Civ-HASTINGS
87-2087-Civ-HASTINGS

MICHAEL D. RAY, PLAINTIFF

vs.

U. S. DEPT OF JUSTICE, ET AL., DEFENDANTS

Miami, Florida
April 12, 1989

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DAVID W. DYER

APPEARANCES:

For the Plaintiff:

MICHAEL D. RAY and NEIL D. KOLNER, ESQ.

For the Defendant:

CAROLE JEANDHEUR and DEXTER LEE, AUSA, ESQ.

* * * *

[9] Exemption 6 is the personal privacy exemption pled before, as the Court noted in its decision, there is a balancing that must be done between the privacy of the individuals who provided the information and the needs of the individuals who have requested the information, and the need of the public at large to get such information.

We feel this balance does mean in favor of the personal privacy in part because of the possible retaliation against the individuals who provided the information, should their identities be released in light also of the fact that the information we don't believe at this point will aid the plaintiff's in the purposes for which they seek it.

The information is dated. The interviews are from 1982 and '83. The chances of being able to track down these individuals and find out whether their statements are accurate seems unlikely, also, since that time the Government of Haiti has been in a great deal of flux; the Duvoleyes have left the country. There have been several coupes; changes of Government; center unstable.

The information about conditions in 1983 is just not likely to be applicable to the situation in '86 or '89 when the plaintiff's requested that information.

* * * *

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Department of State TELEGRAM

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UNCLAS PORT AU PRINCE 1014

E.O. 12356 N/A
TAGS: HA, SHUM, SCOM, SHUM, SOCI
SUBJECT: HAITIAN RETURNEES

1. THE EMBASSY CONTINUES TO FIND THAT ITS RETURNEE FOLLOW-UP PROGRAM FOR HAITIANS RETURNED TO HAITI, EITHER FOLLOWING EXPULSION FROM THE UNITED STATES OF THOSE PICKET UP ON THE HIGH SEAS BY THE US COAST GUARD, IS UNKNOWN. THE RESULT IS THAT MANY HAITIANS IN THE US BELIEVE THAT THEY WOULD BE MISTREATED OR PERSECUTED SHOULD THEY RETURN TO HAITI. SUCH IS NOT THE CASE, AS THE DEPARTMENT KNOWS.

2. PUBLICITY ON THE EFFECTIVE RETURNEE FOLLOW-UP PROGRAM WOULD BE PARTICULARLY HELPFUL IN MIAMI AND NEW YORK SINCE MANY HAITIANS CURRENTLY IN DETENTION THERE DO NOT RETURN VOLUNTARILY TO HAITI FOR FEAR OF WHAT AWAITS THEM ON THEIR RETURN. WE UNDERSTAND THAT CERTAIN HAITIAN EXILE ORGANIZATIONS HAVE CONVINCED DETAINEES AT THE KROME DETENTION CENTER IN MIAMI, FOR EXAMPLE, THAT THEY WOULD BE PUT TO DEATH SHOULD THEY RETURN.

3. TO MEET THIS PROBLEM, THE EMBASSY PROPOSES THAT THE DEPARTMENT SEEK A SUITABLE OPPORTUNITY TO PRESENT THE FACTS TO THE TARGET AUDIENCES CONCERNED. FOR ITS PART, THE EMBASSY WILL PREPARE A FACT SHEET (SEPTEL) EXPLAINING HOW HAITIAN RETURNEES HAVE
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PAGE 02 PORT A 01014 171424Z

TREATED -- NO DEATHS, ONLY ONE ALLEGED CASE OF MISTREATMENT

UNCLASSIFIED

[redacted]

67

AMONG THE 271 HAITIAN INTERDICTEES INTERVIEWED IN FOLLOW-UP VISITS SINCE 1982 (26 PERCENT OF THE RETURNEE POPULATION).

4. OUR OBJECTIVE HERE IS TO PRESENT THE FACTS TO THE HAITIAN COMMUNITY IN THE US WITH A VIEW TOWARD FACILITATION THE DECISION TO RETURN BY HAITIANS WHO TRULY WANT TO RETURN TO THEIR FAMILIES HER BUT ARE DETERRED BY FALSE INFORMATION FOISTED ON THEM FOR POLITICAL REASONS.
MCMANAWAY

(14)

89

Department of State

TELEGRAM

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PAGE 01 PORT A 01252 01 OF 02 021741Z
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UNCLAS SECTION 01 OF 02 PORT AU PRINCE 1252

E.O. 12356 N/A
TAGS:HA, SHUM, SCOM, SOCI
SUBJECT: FACT SHEET ON AMEMBASSY PORT AU PRINCE 'S MONITORING OF HAITIAN INTERDICTEES AND RETURNEES

REF: PAP 1014

1. SUMMARY: THE FOLLOWING IS A FACT SHEET TO BE USED IN PRESENTATIONS TO TARGETED U.S. AUDIENCES EXPLAINING HOW HAITIAN INTERDICTEES AND OTHER RETURNEES (DEPORTEES, EXCLUDEES, AND WITHDRAWALS OF APPLICATION) HAVE BEEN TREATED (SEE REFTEL). EMBASSY INTERVIEWS OF 398 HAITIAN INTERDICTEES AND RETURNEES HAVE REVEALED ONLY
ONE ALLEGED INCIDENT OF OFFICIAL HARASSMENT AMONG THE HAITIANS RETURNED TO HAITI BY THE U.S. COAST GUARD OR THE U.S. IMMIGRATION AND NATURALIZATION SERVICE. END SUMMARY.

2. AMEMBASSY PORT AU PRINCE K'S MONITORING OF HAITIAN INTERDICTEES
A. THE U.S. HAITI BILATERAL AGREEMENT ON SELECTIVE INTERDICTION:
THE SEPTEMBER 23, 1981 U.S. HAITI BILATERAL AGREEMENT ON SELECTIVE INTERDICTION ESTABLISHED A COOPERATIVE PROGRAM OF U.S. COAST GUA
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PAGE 02 PORT A 01252 01 OF 02 021741Z

DEPARTMENT OF STATE A/CDC/MR
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DATE ED BY T. Hearn DATE 5/28/02

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69

INTERDICTION AND RETURN TO HAITI OF HAITIAN MIGRANTS WHO ARE FOUND WITHOUT VALID TRAVEL DOCUMENTS AND WHO FAIL TO DEMONSTRATE TO U.S. IMMIGRATION OFFICERS A LEGITIMATE CLAIM FOR POLITICAL ASYLUM. THE COAST GUARD HAS INTERDICTED AND RETURNED 1162 HAITIANS SINCE THE AGREEMENT WAS SIGNED. THIS PROCESS OF SELECTIVE INTERDICTION REMAINS IN EFFECT AND HAS SUCCEEDED IN DRAMATICALLY REDU CING
THE VOLUME OF ILLEGAL HAITAIN ARRIVALS IN THE SOUTHEASTERN U.S. FROM 15,094 IN 1980 TO 380 IN 1983.

B. HAITIAN GOVERNMENT ASSURANKCE THAT INTERDICTEES WILL NOT BE PROSEC UTED:
THE GOH HAS GIVEN WRITTEN ASSURANCE IN THE INTERDICTION AGREEMENT THAT THE INTERDICTTES WILL NOT BE PROSECUTED FOR THEIR ILLEGAL DEPARTURE FROM HAITI, AN ACT WHICH IS IN VIOLATION OF HAITIAN LAW. ACCORDING TO THIS LAW, ALL DEPARTING HAITIANS ARE REQUIRED TO OBTAIN AN EXIT VISA FROM THE MINISTRY OF THE INTERIOR. THE GOH ALSO HAS A LAW PROHIBITING TRAFFICKING IN ALIENS WHICH CARRIES THE PENALTIES OF FINES UP TO $10,000 AND THREE YEARS IN PRISON. UNDER THE AGREEMENT, THE GOH PLEDGED TO PROSECUTE GNLE THE ORGANIZERS AND TRAFFICKERS OF BOAT PEOPLE. THE EMBASSY'S FOLLOW-UP PROGRAM IS DESIGNED TO VERIFY GOH COMPLIANCE WITH THE BILATERAL AGREEMENT.

C. THE FOLLOW-UP PROGRAM:
SINCE SEPTEMBER 1981, AN EMBOFF HAS MONITORED THE RETURN OF HAITIAN BOAT PEOPLE UNDER THE TERMS OF THE U.S. GOH BILATERAL AGREEMENT ON SELECTIVE INTERDICTION. AN EMBOFF INTERVIEWS THE INTERDI CTEES
ABOARD THE COAST GUARD CUTTER UPON THEIR ARRIVAL IN PORT AU PRINCE AND ACTS AS AN OBSERVER DURING THE INTERVIEWS CONDUCTED BY THE HAITIAN RED CROSS, FOREIGN MINISTRY, IMMIGRATION, AND POLICE
UNCLASSIFIED
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PAGE 03 PORT A 01252 01 OF 02 021741Z

OFFICIALS. THE FOLLOWING CHART DISPLAYS THE INFORMATION COLLECTED ON HAITIAN INTERDICTEES BETWEEN OCTOBER 1981 AND THE PRESENT DATE:

	1981	1982	1983	YTD1984	TOTAL
NUMBER OF BOATLOADS OF INTERDICTEES RETURED TO PORT AU PRINCE	2	6	21	7	36
NUMBER OF INTERDIC-TEES RETURNED	64	152	571	375	1162
NUMBER OF INTERDICTEES INTERVIWED IN FOLLO-					

UP TRIPS	95	102	73	271

AS IS SHOWN ABOVE, THE NUMBER OF INTERDICTIONS AND INTERDICTEES HAVE CLIMBED STEADILY SINCE 1982, NECESSITATING MORE FREQUENT FOLLOW-UP TRIPS INTO THE FIELD TO MAINTAIN A 25 PERCENT INTERVIEW RATE. EMBASSY OFFICERS HAVE VISITED ALL AREAS IN HAITI POSSESSING SIGNIFICANT RETURNEE POPULATIONS AT LEAST ONCE, INCLUDING THE REMOTE ISLANDS OF LA GOVAVE, LA TORTUE, AND CAYEMITE. THE 271 INTERDICTEES WHO HAVE BEEN INTERVIEWED IN FOLLOW-UP VISITS REPRESENT 23.3 PERCENT OF THE TOTAL INTERDICTEE POPULATION.

D. FOLLOW-UP TRIP RESULTS:
DURING THE COURSE OF THE INTERVIEW, THE OFFICER ASKS ABOUT THE INTERDICTEES'S AFAMILY, STATE OF HEALTH, EMPLOYMENT OPPORTUNITIES, AND PLANS FOR FUTURE TRAVEL TO THE UNITED STATES. THE QUESTION AS TO WHETHER THE INTERDICTEE HAS EXPERIENCED ANY FORM OF HARASSMENT FROM THE HAITIAN POLICE. MILITARY OR CIVILAIN MILITIA OFFICIALS IS WORKED CASUALLY INTO THE CONVERSATION. IN THE TWO AND ONE-HALF YEARS OF THE PROGRAM'S EXISTENCE, ONLY ONE INERDICTEE HAS MENTIONED A THREAT OF MISTREATMENT BY HAITIAN AUTHORITIES. HIS CLAIM WAS UNVERIFIABLE AS THERE WERE NO WITNESSES PRESENT.

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PAGE 01 PORT A 01252 02 OF 02 021731Z
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UNCLAS SECTION 02 OF 02 PORT AU PRINCE 1252

3. EMBASSY MONITORING OF OTHER HAITIAN RETURNEES:
SINCE NOVEMBER1981, THE EMBASSY HAS ALSO MONITORED
THE STATUS OF THE HAITIANS RETURNED TO UHAITI BY THE U.S.
IMMIGRATION SERVICE AS DEPORTEES, EXCLUDEES, OR WITHDRAWASL
OF APPLICATION. AS THE INS GENERAL COUNSEL SUGGESTED THAT TIME
PERMITTING, THE EMBASSY CONTACT THESE TYPES OF RETURNEES AS
WELL AS THE INERDICTEES, AN EMBOFF ZONDUCTS THE SAME TYPE OF
INTERVIEW AS DESCRIBED ABOVE AT THE TIME OF THE
RETURNEE'S ARRIVAL AT THE PORT AU PRINCE AIRPORT AND WITHIN
SIX MONTHS OF HISK RETURN TO HAITI. THE FOLLOWING CHART DISPLAYS
THE DATA COLLECTED ON HAITIANS WHO HAVE BEEN DEPORTED OR EXCLUDED
FROM THE U.S. AS WELL AS THOSE WHO WITHDREW THEIR APPLICATION FOR
ADMISSION AT THE U.S. PORT OF ENTRY:

	1981-1982	1983	YTD 1984	TOTAL
NUMBER OF RETURNEES MET AT AIRIORT	424	19	18	461
NUMBER OF OTHER RE-TURNEES IN-TERVIEWED IN FOLLOW-				

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PAGE 02 PORT A 01252 02 OF 02 021731Z

UP TRIPS	88	36	3	127

THE 127 RETURNEES WHO HAVE BEEN INTERVIEWED REPRESENT 27.5 PERCENT

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72

OF THE TOTAL RETURNEE POPULATION. NONE OF THESE INTERVIEWED CLAIMED TO HAVE SUFFERED POLITICAL PERSECUTION AS A RESULT OF THEIR DEPARTURE.

4. ANALYSIS OF THE FOLLOW-UP TRII RESULTS:
INTERDICTEES AND RETURNEEES APPEAR TO REINTEGRATE INTO THEIR HOME COMMUNITIES FAIRLY QUICKLY AND RESUME THEIR LIVES WITHOUT INTERFERENCE FROM THE HAITIAN GOVERNMENT. LOCAL AUTHORITIES ARE NOT PROVIDED WITH LISTS OF NAMES OF INTERDICTEES AND RETURNEES AND THERE ARE NO REPORTS OF THEIR HAVING ATTEMPTED TO SEEK SUCH *INFORMATION. THE EMBASSY HAS NOT CONFRONTED ANY OFFICIAL OBSTACLES* IN SEEKING INTERDICTEES AND RETURNEES IN FOLLOW-UP TRIPS:
OUR INTERVIEWS HAVE BEEN CONDUCTED IN THE ABSENCE OF GOH OFFICIALS AND THE INFORMATION COLLECTED CONFIRMS THAT THE HAITIAN GOVERNMENT HAS COMPLIED WITH ITS ASSURANCES NOT TO PERSECUTE RETURNING HAITIANS.

5. ACTION REQUESTED: REQUEST DEPARTMENT PROVIDE INFORMATION IN WHATEVER FORMAT IS DEEMED DESIRABLE TO REACH TARGET AUDIENCES IN MAIMI, NEW YORK, AND WASHINGTON, D.C. TO MAKE THE POINT THAT HAITIANS RETURNED TO PORTK AU PRINCE BY THE U.S. COAST GUARD OR THE INS FACE NO REPRISALS OR BAD TREATMENT UPON THEIR RETURN. THE PURPOSE OF THIS INFORMATION EFFORT IS TO COUNTE CRITICISM OF
THE USG IN THIS REGARD AND TO ENHANCE THE INCENTIVES FOR GHAIT:ANS ILLEGALLY IN THE U.S. TO RETURN VOLUNTARILY TO HAITI.
MCMANAWAY

SUPREME COURT OF THE UNITED STATES

No. 90-747

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ORDER ALLOWING CERTIORARI
Filed March 4, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted limited to Question 1 presented by the petition.

March 4, 1991

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